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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No. 519

WILLIAM A. S. DOUGLAS and THE AMERICAN MERCURY, Inc.,
Petitioners,

v.

ELIJAH WILLIAM CUNNINGHAM and POST PUBLISHING COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT OF THE SAME.

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No.

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v.

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI

TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, William A. S. Douglas and The American Mercury, Inc., plaintiffs, respectfully pray for a writ of certiorari to the Circuit Court of Appeals for the First Circuit to review a judgment of that Court entered on August 9, 1934.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action was a suit in equity brought by the petitioners in the United States District Court of Massachusetts to enjoin and recover damages for the infringement of the copyrighted short story "Ku Klux" written by W. A. S. Douglas and published in The American Mercury for March, 1928, No. 51, Vol. 13. The copyright was duly registered by The American Mercury, Inc. after publication with notice of copyright. Subsequently, the copyright in the short story was assigned to the petitioner Douglas, who at

the time of the infringement was, and now is, the sole owner of the entire copyright and all rights in the short story.

The infringement charged is the publication of the same story in the Boston Sunday Post of August 30, 1931, published by respondent, Post Publishing Company. The respondent Cunningham, under the name "Bill Cunningham", had rewritten the story in his own words, giving the characters different names, but using the identical plot. The infringing story began on the front page of the first news section of the Sunday issue, under the title "Klan Killed Hero of War", and was written up and published as news, although all the episodes and characters were entirely fictitious. Respondents admitted both the infringement and the validity of the copyright, and that 384,834 copies of the Sunday Post containing the infringing story were printed (Rec. p. 20). The only question left for the District Court, therefore, was the amount of damages.

The petitioners offered evidence showing the substantial value of the story "Ku Klux" and that it had been regarded as of great value by publishers, motion picture and stage people and others qualified to judge (Rec. p. 18 and Addendum, pp. 4 and 6).

The respondent Cunningham testified that he got the story from another news reporter. His testimony was entirely uncorroborated and in response to a direct question from the Court, Cunningham stated that he had not read Mr. Douglas' story in The American Mercury (Addendum to Rec. pp. 6–8).

Petitioners admitted at the trial the innocent infringement by the respondent, Post Publishing Company (Rec. p. 18), but at no time have they conceded the innocence of the respondent Cunningham, and, in fact, flatly deny it.

The petitioners relied upon the statutory damages which might be awarded by the court in lieu of actual damages, under Section 25 of the Copyright Act (Title 17, U. S. Code, Sec. 25). On all the evidence and at the close of the case, the District Judge (Lowell) granted an injunction and awarded petitioners $5000 as damages, $1500 as a reasonable attoney's fee, and costs (Rec. pp. 20–21). This is at the rate of $1 per infringing copy up to 5000 copies.

District Judge Lowell was taken ill shortly after rendering his

decision and died before the final decree was signed. The final decree, therefore, was signed by Judge Brewster of the District Court, District of Massachusetts (Rec. pp. 12–13). See decision of Judge Brewster Rec. pp. 14–16.

On appeal, the Circuit Court of Appeals for the First Circuit (Judge Bingham dissenting) held the award of $5000 to be so unreasonable and unjust as to amount to an abuse of the discretion given the Court under Section 25 of the Copyright Act, and reduced the award of damages to $250, the minimum permitted by the Act, and reduced the attorney's fee to $750.

The decision of the Court of Appeals conflicts squarely with the express language of Section 25 of the Copyright Act, with the decisions of this Court, and with the decisions of other Circuit Courts of Appeal.

The power of the District Court to award statutory damages is clearly defined in Section 25 of the Copyright Act and within the minimum and maximum limits of $250 to $5000 therein provided is purely discretionary. The decisions of this Court and other courts have regularly upheld the discretionary power of the District Court within the limits laid down by the Statute.

Section 25 of the Copyright Act, so far as here applicable, provides as follows:

> "Section 25. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: . . . (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . .
>
> Second. In the case of any work enumerated in Section 5 of this title, except a painting, statue, or sculpture, $1 for every

infringing copy made or sold by or found in the possession of the infringer or his agents or employees;"

The decision of the Court of Appeals disregards the plain intent of Congress and reads out of Section 25 of the Copyright Act the express provision for the award of maximum damages of $5000, and, in effect, limits the amount of statutory damages which may be awarded in lieu of actual damages to the minimum of $250, in every case.

The decision squarely conflicts with the decisions of this Court in the following cases:

L. A. Westermann Co. v. *Dispatch Printing Co.*, 249 U. S. 100.

Jewell-LaSalle Realty Co. v. *Buck*, 283 U. S. 202.

Also with the decisions of other Circuit Courts of Appeal in the following cases:

S. E. Hendricks Co. v. *Thomas Publishing Co.*, 242 Fed. 37, 41 (C. C. A. 2d).

Campbell v. *Wireback*, 269 Fed. 372, 375 (C. C. A. 4th).

No-Leak-O Piston Ring Co. v. *Norris*, 277 Fed. 951, 954 (C. C. A. 4th).

M. Witmark & Sons v. *Pastime Amusement Co.*, 2 Fed. (2d) 1020 (C. C. A. 4th), affirming the District Court, E. D. South Carolina in 298 Fed. 470, 480–482.

QUESTIONS RAISED BY THE CASE.

This case therefore raises the following questions:

1. Whether the District Court is empowered by Section 25 of the Copyright Act to award, in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages, in its discretion, to allow $1 for every infringing copy made and sold by the infringer, except that such damages shall not exceed the sum of $5000, nor be less than the sum of $250?

2. Whether under Section 25 of the Copyright Act, the allowance by the District Court of $5000 as damages in lieu of actual damages constitutes an abuse of the District Court's discretion, where

the respondents made and sold more than 5000 infringing copies of the petitioners' short story?

3. Whether, where Section 25 of the Copyright Act empowers the District Court to award to the copyright proprietor, in lieu of actual damages and profits such damages as to the court shall appear to be just, except that such damages shall not exceed the sum of $5000 nor be less than the sum of $250, the award of $5000 is so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court under Section 25 of the Copyright Act.

The decision of the Court of Appeals throws into a state of confusion the whole question of the amount of statutory damages that can be awarded in lieu of actual damages and profits, under Section 25 of the Copyright Act. The District Court is obliged in any event to award the minimum of $250, in lieu of actual damages and profits. *L. A. Westermann Co.* v. *Dispatch Printing Co.; Jewell-LaSalle Realty Co.* v. *Buck* (*supra*). But can the District Court award more than the minimum and, particularly, can it award the maximum of $5000 and can it award damages at the rate of $1 per infringing copy, when such damages to the Court appear to be just? The statute itself and the decisions of this Court and other Circuit Courts of Appeals apparently say yes, but the decision of this Circuit Court of Appeals says not.

The question as to the power of the District Court, in its discretion, to award the *maximum damages of $5000* has not yet been expressly decided by this Court. It is of the highest importance to the effective administration of the Copyright law that this question as to the extent of the discretionary power given by Congress to the District Court to award the maximum damages, or more than the minimum damages, in those cases in which such damages appear to the Court to be just, be settled. If the District Court has no discretion except to award the minimum damages of $250 in those cases in which the plaintiff is unable to prove actual damages, as the decision of the Court of Appeals implies, the Copyright law will be reduced to the state of impotence it was in prior to 1909 when, due to the lack of an effective remedy, unscrupulous persons could

appropriate literary property with impunity. This situation the present Copyright Act of 1909, and specifically Section 25, was expressly designed to prevent.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your Petitioners respectfully pray that the Writ be allowed for the following reasons:

1. Because the decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decisions of this Court in *L. A. Westermann Co.* v. *Dispatch Printing Company*, 249 U. S. 100, and *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202.

2. Because the decision of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *S. E. Hendricks Co.* v. *Thomas Publishing Co.*, 242 F. 37, 41, and with the decisions of the Circuit Court of Appeals for the Fourth Circuit in *Campbell* v. *Wireback*, 269 F. 372, 375; *No-Leak-O Piston Ring Co.* v. *Norris*, 277 F. 951, 954; and *M. Witmark & Sons* v. *Pastime Amusement Co.*, 2 F.(2d) 1020, affirming the District Court, E. D. South Carolina in 298 F. 370, 480–482.

3. Because the decisions of the Circuit Court of Appeals for the First Circuit ignores the express language of Section 25 of the Copyright Act and disregards the plain intent of Congress expressed therein.

4. Because the public interest in the protection of literary property and the effective administration of the Copyright law requires that the question as to the discretion of the District Court to award the maximum statutory damages of $5000 within the expressed limits, in lieu of actual damages and profits, be settled.

5. Because it thus appears that an important question of Federal law is presented which has not been, but should be, expressly decided by this Court.

PRAYER.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the First Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings of the case, numbered and entitled on its Docket No. 2903, Elisha W. Cunningham and Post Publishing Company, Defendants-Appellants *v.* William A. S. Douglas and The American Mercury, Inc., Plaintiffs-Appellees, and that the said Decree of the Circuit Court of Appeals for the First Circuit may be reversed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioners will ever pray.

WILLIAM A. S. DOUGLAS AND
THE AMERICAN MERCURY, INC.,
Petitioners,
by GEORGE P. DIKE.

CEDRIC W. PORTER,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No.

WILLIAM A. S. DOUGLAS AND THE AMERICAN MERCURY, INC., PETITIONERS,

v.

ELIJAH WILLIAM CUNNINGHAM AND POST PUBLISHING COMPANY, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONERS

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Petition is brought to review a decision of the Circuit Court of Appeals for the First Circuit to enjoin and recover damages for the infringement of a copyright. The decision, written by Judge Wilson (Judge Bingham dissenting) and reported at 72 F. (2d) 536 (Rec. p. 31–42) held that the award of $5000 as statutory damages and $1500 as attorney's fee was an abuse of the discretion of the District Court and reduced the award of damages to $250 and the attorney's fee to $750. The decision of Judge Lowell of the District Court was rendered orally from the bench and is unreported except in the Record herein, pages 20–21.

JURISDICTION.

The date of the judgment to be reviewed is the date of the judgment of the Circuit Court of Appeals reversing the decree of the District Court made August 9, 1934 (Rec. p. 43). The statute giving jurisdiction is Section 240a of the Judicial Code, Tit. 28 U. S. C. Section 347, as amended by the Act of February 13, 1925. Jurisdiction of copyright suits is sustained in *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the First Circuit erred in holding that the award of $5000 statutory damages was an abuse of the discretion of the District Court.

2. The Circuit Court of Appeals for the First Circuit erred in holding that the District Court was not authorized, under Section 25 of the Copyright Act where the respondents made and sold more than 5000 infringing copies of the petitioners' short story, to award $5000 as statutory damages.

3. The said Court erred in modifying and in not affirming the decree of the District Court awarding $5000 as damages and in awarding costs to the respondents.

ARGUMENT.

The decision of the Court of Appeals is in conflict with the statute itself and with the decisions of this Court and other Circuit Courts of Appeals, which makes it clear beyond any question that within the limits stated "the amount of damages awarded in lieu of actual damages and profits" is purely discretionary with the District Court. Within those limits, any award of damages is just and reasonable and there can be no abuse of the Court's discretion. The statute itself specifies the minimum and maximum damages which Congress regarded as just and reasonable and sets the limits of the Court's discretion. ***If the respondents believe the maximum limit of $5000 permitted by Section 25 is unreasonable, which petitioners deny, their remedy lies with Congress.*** As Mr. Justice

Brandeis said in *Jewell-LaSalle Realty Company* v. *Buck (infra)*, pp. 207, 208:

> *"If* as applied to musical compositions, *the provisions of the entire section have proved unreasonable, the remedy lies with Congress."*

Point 1. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE EXPRESS PROVISIONS OF SECTION 25 OF THE COPYRIGHT ACT.

Section 25 of the Copyright Act, so far as here pertinent, is quoted on page 3–4 of the Petition.

The words of the statute are clear and express as to the damages which are recoverable. The plaintiff may recover actual damages and profits, "or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow" . . . "$1 for every infringing copy made or sold by . . . the infringer" . . . except that "such damages" shall not "exceed the sum of $5000 nor be less than the sum of $250". Being unable to prove actual damages and profits, the petitioners were left to "such damages as to the court shall appear to be just" within the limits stated. The court was empowered to award $1 for every infringing copy, under paragraph Second, up to the limit of $5000. The respondents admittedly published 384,834 copies of the infringing story, many times more than 5000. The award of the District Judge, although the maximum permitted, was obviously within the limits provided by the statute. *The statute itself specifies the minimum and maximum amounts which Congress regarded as just and reasonable and sets the limits of the court's discretion.* There being more than 5000 infringing copies, there could be no abuse of the Court's discretion in awarding statutory damages within those limits. Under these circumstances, the award of damages within those limits cannot be held so unreasonable and unjust as to amount to an abuse of the discretion vested in the Court. There can be no doubt as to the intent of Congress to provide for the maximum, as well as the minimum, amounts which may be awarded in lieu of actual dam-

ages, and that Congress regarded the amounts specified as just and reasonable.

Point 2. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

In *L. A. Westermann Company* v. *Dispatch Printing Co.*, 249 U. S. 100, this Court had under consideration the meaning of Section 25, and particularly the amount of damages allowable "in lieu of actual damages and profits". The copyrights were for pictorial illustrations of styles in women's apparel.

Mr. Justice Van Devanter said (pp. 106, 107) :*

> "On the question of the amount of damages to be awarded for each case we are in accord with the Circuit Court of Appeals. Both parties recognize that under the proofs the damages must be assessed under the alternative provision requiring the infringer, in lieu of actual damages and profits, to pay such damages as to the court shall appear to be just, etc. The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment. *There is no uncertainty as to what that measure is or as to its limitations. The statute says, first, that the damages are to be such as to the court shall appear to be just; next, that the court may, in its discretion, allow the amounts named in the appended schedule, and finally, that in no case shall they be more than $5000 nor less than $250,* except that for a newspaper reproduction of a copyrighted photograph they shall not be more than $200 nor less than $50. *In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less*

* (Italics ours throughout this brief.)

than the minimum. Within these limitations the court's discretion and sense of justice are controlling, but it has no discretion when proceeding under this provision to go outside of them.

Apart from the natural import of its words, the history of the provision makes strongly for this view. . . . In 1909, when the copyright statutes were revised, these provisions, and others without present bearing, were brought together in the 'in lieu' provision now under consideration. True, they were broadened so as to include other copyrights and the limitations were changed in amount, but the principle on which they proceeded—*that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations—was retained.*"

"The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just'. *Like both the old, it prescribes a minimum limitation and, like one, a maximum limitation.*"

In *Jewell-LaSalle Co.* v. *Buck*, 283 U. S. 202, this Court again had before it the "in lieu of" clause of Section 25. There the copyright covered a musical composition and the amounts allowable as damages under paragraph 4th of Section 25(b) were in question. The following questions were certified from the Circuit Court of Appeals for the Eighth Circuit:

"Question II. 'In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called 'no other case', clause of Section 25(b) of the Copyright Act (U. S. C. Title 17, Section 25), reading, 'and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty?' "

Mr. Justice Brandeis said (pp. 207, 208):

"*The definite specification of a maximum and minimum in*

every case, is not contradicted in any way by these legislative suggestions as to what may be deemed reasonable allowances in cases falling within the prescribed limitations. See *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 109, 63 L. Ed. 499, 502, 503, 39 S. Ct. 194. *If as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress.* Question II. is answered in the affirmative."

Question III was as follows:

"'Is Section 25(b) Fourth of the Copyright Act (U. S. C. title 17, Section 25) applicable in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?'"

Mr. Justice Brandeis said (p. 208):

"This question has in part been necessarily answered by our discussion of question II, for unless the number of infringing performances of a copyrighted musical composition exceeds twenty-five, the minimum allowance of $250 must be made. *Where more than twenty-five infringing performances are proved, and there is no showing as to actual loss, the court must allow the statutory minimum, and may, in its sound discretion, employ the scheduled ten dollars a performance as a basis for assessing additional damages.* See *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, 106, 63 L. ed. 499, 502, 39 S. Ct. 194. Subject to this limitation, question III. is answered in the affirmative."

If more than 500 infringing performances were proved the District Court could, in its discretion, have awarded the maximum of $5000 at $10 per infringing performance. Substituting the words "$1 for each infringing copy" for the words "$10 a performance" in Mr. Justice Brandeis' statement above, the language applies directly to the present case.

Point 3. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND AND FOURTH CIRCUITS.

In *S. E. Hendricks Co.* v. *Thomas Pub. Co.*, 242 Fed. 37, the Court of Appeals for the Second Circuit held the award of $2500 statutory damages for 2800 infringing copies of a copyrighted book, plus a reasonable attorney's fee of $2500, to be within the discretion of the District Court. Judge Hough, after quoting the pertinent provisions of Section 25, said (p. 41):

> "As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. In the Mail & Express Co. Case, *supra*, we held that, in respect of an infringing publication coming under the same general category as does the present one, $250 was the minimum amount to which a plaintiff could be entitled. In *Gross* v. *Van Dyck Gravure Co.*, 230 Fed. 412, 144 C. C. A. 554, Hand, J., in the trial court held that the duty was by this statute laid upon the court to 'estimate damages' in place of the 'old penalties, . . . but to estimate them within the sums given, without the limitations of usual legal proof. The whole course of copyright law shows a recognition of the difficulty of making legal proof of damages and in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof.' On appeal from that construction of the statute, this court approved the method pursued.
>
> *That the statute limits the discretion of the court to a minimum award of $250 and a maximum of $5000 in lieu of actual damages* has also been held in *L. A. Westermann Co.* v. *Dispatch, etc. Co.*, 233 Fed. 609, 147 C. C. A. 417 (C. C. A. 6th)."

In *Campbell* v. *Wireback*, 269 Fed. 372, the Circuit Court of Appeals for the Fourth Circuit held the award of $4000 statutory damages for 4000 infringing copies of copyrighted advertising cuts not to be an abuse of the District Court's discretion. Judge Knapp said (p. 375):

> "It appears that defendants prepared a catalogue of their appliances, including the infringing cuts, and had 4,000 copies printed. Of these some 750 had been distributed at the time of the trial; the others were still in their possession. In the opinion of the court below all that is said on the question of damages is this:
>
> > 'The plaintiffs are entitled to an injunction and to a decree for the statutory $1 for each of the infringing copies found in defendants' possession and for the destruction of such copies.'
>
> This is claimed to show that damages were assessed at $4,000, not in the exercise of discretion, but merely on the basis of the number of catalogues which defendants had printed, and therefore that it is not an award of 'such damages as to the court shall appear to be just,' as the statute provides. We do not so construe the award. The language is perhaps a little ambiguous, but the meaning and intent are not uncertain. The court is presumed to know the provisions of the Copyright Act, and to have exercised the discretion which that act enjoins, and the award must therefore be accepted, unless the contrary distinctly appears, as expressing its deliberate judgment of what is just under the facts and circumstances developed at the trial. ***In such a case as this, where the damages are indirect and not capable of ascertainment, the compensation which the copyright proprietor shall receive for the injuries caused by the infringer is committed to the discretion of the trial judge.*** This is distinctly held in Westermann Co. *v.* Dispatch Co., 249 100. . . ."

See also:

No-Leak-O Piston Ring Co. v. *Norris*, 277 Fed. 951 at 954, where the Circuit Court of Appeals for the Fourth Circuit held the award of $3000 as statutory damages for the distribution of 15,000 copies of an infringing pamphlet, plus $750 attorney's fee, not to be an abuse of the District Court's discretion.

M. Witmark & Sons v. *Pastime Amusement Company*, 2 Fed. (2d) 1020, where the Circuit Court of Appeals for the Fourth Circuit upheld the award of $250 statutory damages for one performance of a musical composition as not an abuse of the District Court's discretion and affirmed the District Court, E. D. South Carolina, in 298 Fed. 470 at 480–482.

Point 4. THE DECISION OF THE COURT OF APPEALS VIOLATES THE SETTLED RULES OF STATUTORY CONSTRUCTION LAID DOWN BY THIS COURT.

(a) Where a Statute Gives a Discretionary Power to an Individual to be Exercised by Him Upon His Own Opinion of Certain Facts, it is a Sound Rule of Construction that the Statute Constitutes Him the Sole and Exclusive Judge of the Existence of those Facts.

Where Section 25 of the Copyright Act gives to the District Court the discretionary power to award such damages as *to the court* shall appear to be just within the limits of $250 and $5000, the statute clearly constitutes the District Court the sole and exclusive judge of the proper amount of damages to be awarded within these limits.

In *Martin* v. *Mott*, 12 Wheaton 19, this Court, by Mr. Justice Story, said (p. 32):

> "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence to those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power

which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself."

In *Luther* v. *Borden*, 7 Howard 1, this Court by Chief Justice Taney, after quoting the first sentence above from Martin *v.* Mott, said (p. 45):

> "The grounds upon which that opinion is maintained are set forth in the report, and that they are conclusive. The same principle applies to the case now before the court. *Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.*"

In *Philadelphia & Trenton Railroad Company* v. *Stimpson*, 14 Peters 488, Mr. Justice Story said (p. 458):

> "It is a presumption of law, that all public officers, and especially such high functionaries, perform their proper official duties until the contrary is proved. And where, as in the present case, an act is to be done, or patent granted upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent, is prima facie evidence that the proofs have been regularly made, and were satisfactory. *No other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency.*"

See also:

Mullan v. *United States*, 140 U. S. 240, at 245 (Mr. Justice Harlan).

United States v. *Chemical Foundation, Inc.*, 272 U. S. 1 at 14 to 15 (Mr. Justice Butler).

Section 25 of the Copyright Act having empowered the District Court to award such damages as to the court shall appear to be just, within the limits of $250 and $5000, and in its discretion to

award $1 for every infringing copy made or sold by the infringer, the District Court must be presumed to have properly discharged its official duty in assessing damages, and the award of damages within those limits cannot constitute an abuse of the District Court's discretion.

(b) The Duty of the Courts is to Enforce the Law as Written. The Courts are Not Concerned with its Wisdom or Policy. If Such Enforcement Works a Hardship in a Particular Case (which Petitioners Deny in this Case) the Responsibility for Amending the Law Lies with Congress.

This Court has many, many times said that where the language of the statute is plain, the duty of the court is to enforce it as written. The courts are not concerned with the wisdom of the law or its policy. This is the function of the legislature.

The Court of Appeals in ignoring the plain provisions of Section 25, permitting the award of $5000 maximum damages, has in effect read out of the statute the provision as to maximum damages. In so doing, it has indulged in judicial legislation and usurped the functions of Congress. If Section 25 in this particular case is unjust and works a hardship upon the respondents, which petitioners deny, the remedy lies with Congress, not with the Court of Appeals.

In *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, this Court by Mr. Justice Day said (p. 217):

> "*Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written*, provided it be within the constitutional authority of the legislative body which passed it. Lake County *v.* Rollins, 130 U. S. 662, 670, 671; Bate Refrigerating Co. *v.* Sulzberger, 157 U. S. 1, 33; United States *v.* Bank, 234 U. S. 245, 258; Caminetti *v.* United States, 242 U. S. 470, 485."

In *United States* v. *Union Pacific Railroad Company*, 91 U. S. 72, this Court by Mr. Justice Davis said (p. 91):

> "Counsel have dwelt with special emphasis upon the consequences which would result from a decision adverse to the appellant. We cannot consider them in disposing of the questions arising upon this record. *The rights of the parties rest upon a statute of the United States. Its words, as well as its reason, spirit, and intention, leave, in our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended.*"

In *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, this Court by Mr. Justice Moody said (p. 295):

> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. *It is urged that this is a harsh construction.—To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional*

See also:

New Jersey v. *Anderson*, 203 U. S. 483, at 489, 490.
Caminetti v. *United States*, 242 U. S. 470, at 485.
Whitehead v. *Galloway*, 249 U. S. 79, 84 to 85.
United States v. *Goldenberg*, 168 U. S. 95, 102.
Lake County v. *Rollins*, 130 U .S. 662, 670, 671.
Maxwell v. *Moore*, 22 Howard, 185 at 191.
Ebert v. *Poston*, 266 U. S. 548 at 554.

Point 5. JUDGE BINGHAM'S DISSENTING OPINION STATES THE PROPER RULE TO BE FOLLOWED HERE, AND IS IN ACCORD WITH THE STATUTE, AND THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

Judge Bingham vigorously dissented from the majority opinion of the Court.

Judge Bingham said (Rec. p. 40–41):

"As there was but a single infringement of the plaintiff's work (Westermann *v.* Dispatch Printing Co., 249 U. S. 100) the court, under the statute, was required to assess a sum not less than $250; and, *such sum being fixed by Congress in the statute, it is to be presumed to be just within the meaning of the act;* and subdivison second specifically provides that in the case of a work such as that of the plaintiffs the court may award '$1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees', limited, as specified in (b) not to 'exceed the sum of $5000'. *If the sum of $250 which the statute prescribes shall be awarded for an infringement consisting of the making of a single copy, is just within the meaning of Section 25 (b) then, on proof showing the making of additional infringing copies up to 5000 or over, an award of $5000, as fixed by the statute, is likewise to be regarded as just within its meaning.* Under the statute, had the infringement consisted in the making of a single copy or of 250 copies the plaintiffs would have been entitled to only $250 as a just award. But on its appearing that the defendants made 384,834 infringing copies instead of one or 250, the question is:—Whether the District Judge can be said to have abused his discretion by following the terms of the statute and awarding a dollar a copy for at least 5000 copies of the total number of infringing copies made and sold. *To interpret the statute, as applied to the circumstances here disclosed, to mean that the District Judge, in awarding damages at a dollar a copy up to $5000, abused his discretion, would be a travesty on the law and in effect to read out of the*

statute the provisions of Section 25(b) and subdivision second, authorizing an award of '$1 for every infringing copy made or sold' up to $5000.

In my opinion the award of the trial court was authorized and not an abuse of discretion. *An award of damages within the statutory limits cannot be an abuse of discretion in the case of an infringement and sale of infringing copies of the nature and number here shown,* and I fail to see wherein this construction of the act, as applied to the circumstances of this case, conflicts or is not in accord with what was held in the two cases decided by the Supreme Court (Westermann *v.* Dispatch Printing Co., *supra;* Jewell-LaSalle Realty Co. *v.* Buck, 283 U. S. 202) construing this act."

The majority of the Court of Appeals may have thought that the award of $5000 damages was too high. But they cannot properly hold the award was an abuse of the District Court's discretion. In so holding they were substituting their own discretion for that of the District Court, who heard the evidence and saw the witnesses —and Congress has said that it is the discretion of the *District Court* which is controlling, within certain minimum and maximum limits—not that of the Circuit Court of Appeals. Their own idea as to damages does not justify their disregarding the statute, and ignoring the express provision for the allowance of a $5000 maximum. By their construction they have reached a remarkable and unique result—a statute which by express language *gives the District Court discretion* to award damages within certain limits is construed to mean *the exact opposite*—that the District Court *has no discretion* to award damages within those limits.

The petitioners deny absolutely that the award of $5000 damages in this case was unjust and unreasonable. The infringement was particularly flagrant and willful, without extenuating circumstances of any kind. The District Court administered the Copyright Law in accordance with its spirit and intent in a manner to protect the author in his property rights to his own literary creations against the pirating of unscrupulous individuals. The wronged and in-

nocent persons are the petitioners, not the respondents. The Court of Appeals, on the other hand, has administered and construed the Act in a manner to protect the unscrupulous infringer, in effect giving him a license to pirate any literary property at will on the payment of $250 maximum damages to the author and allowing him to lead the author on a long chase through the courts to collect that.

CONCLUSION.

The present Copyright Law, and particularly Section 25, is the fruit of more than one hundred years experience in endeavoring to protect the author and his property in his writings. The provisions of Section 25 represent the accumulated wisdom of years in providing an effective remedy for the owner of literary property against the depredations of the literary pirate. In the twenty-five years the present Copyright Law has been in existence, it has worked remarkably well, and the keystone of the structure has been Section 25. In Section 25 Congress endeavored to give the District Court complete discretion to award, in lieu of actual damages and profits, such damages as to the Court shall appear to be just, within the limits of $250 and $5000. It is of the utmost importance to the effective administration of the Copyright Law that this discretionary power reposed by Congress in the District Court to award statutory damages, and to award the maximum damages of $5000, or more than the minimum damages, in those cases in which such damages appear to the Court to be just, be preserved. Otherwise the Copyright Law will collapse for lack of an effective remedy, and will be reduced to its state of impotence prior to 1909, when unscrupulous persons could infringe with impunity. This Court has not as yet expressly passed upon the power of the District Court to award, in its discretion, *the maximum damages of $5000.*

We respectfully submit that decision of the Circuit Court of Appeals for the First Circuit in holding the award of $5000 damages under the circumstances stated to be an abuse of the District Court's discretion, is in conflict with the plain language of Section 25 of the Copyright Act, and with the decisions of this Court, and with the decisions of other Circuit Courts of Appeal; and that the

question involved is of such public importance that this Court should authoritatively determine it.

We therefore respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers in order that the law relating to statutory damages which may be awarded under Section 25 of the Copyright Act may be made clear; that uniformity of decision between the several circuits be established, and the Circuit Court of Appeals for the First Circuit be required to conform to the express language of the Copyright Act and to the decisions of this Court; and to that end, that a Writ of Certiorari be granted.

Respectfully submitted,

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